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Regis W. Campfield

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WILLS AND TRUSTS

by

Regis W. Campfield*

I. WILLS

EXECUTION. The Texas courts have consistently required that a will be executed in strict compliance with the formalities set forth in section 59 of the Texas Probate Code.¹ With the exception of holographic wills, section 59 of the Code requires two competent witnesses to attest to the execution of a will.²

In *Wich v. Fleming*³ the Texas Supreme Court denied probate to a will because the will was not executed in compliance with the provisions of section 59. Specifically, the persons who witnessed the execution of the will did not sign immediately below the testatrix's signature, but rather, signed the instrument only at the conclusion of the self-proving affidavit. The court followed its earlier holding in *Boren v. Boren*,⁴ which established the rule that a will is not admissible to probate if the witnesses signed only the self-proving affidavit.⁵ The court in *Wich* reasoned that the will and self-proving affidavit serve different purposes and require different types of intent on the part of the witnesses.⁶ The court explained that when a will is offered for probate, the sole function of the self-proving affidavit is to eliminate the need for testimony as to the facts surrounding the execution of the will.⁷ For that reason, the court concluded that a self-proving affidavit is only effective if the will has been properly executed,

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* B.B.A., Notre Dame University; LL.B., University of Virginia. Professor of Law, Southern Methodist University. Professor Campfield wishes to acknowledge the extraordinarily competent assistance of Lisa M. Rey, a graduate of the Southern Methodist University School of Law, in the preparation of this Article.

1. TEX. PROB. CODE ANN. § 59 (Vernon 1980) (originally enacted as TEX. REV. CIV. STAT. art. 8283 (1911)); see, e.g., *Poole v. Starke*, 324 S.W.2d 234, 236 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.); *Maxey v. Queen*, 206 S.W.2d 114, 117 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.).

2. TEX. PROB. CODE ANN. § 59 (Vernon 1980). Section 59 of the Code also sets out two other requirements: (1) the will must be in writing, and (2) it must be signed by the testator. *Id.*

3. 652 S.W.2d 353 (Tex. 1983).

4. 402 S.W.2d 728 (Tex. 1966). The dissent in *Wich* disapproved of *Boren* and argued that a signature under a self-proving affidavit can satisfy § 59 where, as in *Wich*, the witnesses testify that they intended to attest to the execution of the testator's will. 652 S.W.2d at 356-57 (Robertson, J., dissenting).

5. 402 S.W.2d at 729.

6. 652 S.W.2d at 354.

7. *Id.*

and that proper execution, as contemplated by section 59 of the Code, requires the signatures of two witnesses directly below the testator's signature.⁸ Since the will in *Wich* did not satisfy these requirements, the court held that the will was not admissible to probate.⁹

The court recognized the harshness of its decision, but reasoned that the legislature could have changed the result of the court's decision in *Boren*, if it had disagreed with the court's interpretation in that case. The court noted that since the decision in *Boren*, the legislature had twice amended section 59 of the Probate Code without addressing the *Boren* problem.¹⁰

Courts have required literal compliance with the statutes allowing wills since the adoption of the original Statute of Wills in 1540. This requirement retains its vitality today because it spares the courts the burden of protracted litigation over the validity of writings, the form and appearance of which do not resemble the solemn document that a will purports to be. The problems raised in both *Wich* and *Boren*, however, are different. Neither case involved a risk of fraud, forgery, or failure to have the requisite reflective state of mind. Both cases resulted from oversight on the part of the testator or his counsel. Whether public policy should allow the advancement of technicalities over substance where the only benefit is to impose a penalty upon the innocent testator and to provide a sharp warning to others who might make a similar mistake is questionable. The result in *Boren* and *Wich* is particularly anomalous because Texas law does not require wills to be signed at the end as do a number of jurisdictions. That only one other jurisdiction, Montana,¹¹ has adopted the reasoning of *Boren* illustrates the degree to which the Texas Supreme Court is out of step. Oklahoma, Kansas, and Florida have specifically rejected the reasoning of *Boren*.¹²

Conscious Presence. Section 59 of the Code also requires that each witness sign his or her name "in the presence of the testator."¹³ At least one Texas court has employed the "conscious presence" test to determine whether a witness is within the presence of the testator, thereby satisfying section 59's requirement.¹⁴ That court interpreted the conscious presence test to mean that the attestation must occur where the testator is able to see it from his position at the time of attestation or from no less than a slightly altered position.¹⁵ No assistance may be given to the testator to alter his

8. *Id.*

9. *Id.* at 355.

10. *Id.*

11. See *In re Estate of Sample*, 175 Mont. 93, 94, 572 P.2d 1232, 1233 (1977).

12. See *In re Estate of Charry*, 359 So. 2d 544, 545 (Fla. Dist. Ct. App. 1978); *In re Estate of Petty*, 227 Kan. 697, 701, 608 P.2d 987, 992 (1980); *In re Estate of Cutsinger*, 445 P.2d 778, 782 (Okla. 1968).

13. TEX. PROB. CODE ANN. § 59 (Vernon 1980).

14. *Nichols v. Rowan*, 422 S.W.2d 21, 24 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.).

15. *Id.*

position.¹⁶

In *Morris v. Estate of West*¹⁷ the testator signed his will in the presence of two witnesses in a conference room located in a suite of offices. The witnesses, however, left the conference room and signed the will in a secretarial office located down the hall. Six days later the testator and witnesses repeated this procedure when the testator signed a codicil to his will. The Eastland court of appeals upheld the trial court in denying probate to both the will and the codicil.¹⁸ The court concluded that the witnesses were not within the conscious presence of the testator on each occasion as required by section 59.¹⁹ The court's decision is surprising inasmuch as the trial court presented to the jury a special issue on the question of presence expressed not in terms of "conscious presence" but merely in terms of "presence."²⁰ Arguably had the issue been presented differently to the jury, they could have found that the witnesses signed the will and codicil in the conscious presence of the testator. Perhaps the court's willingness to let stand the trial court's formulation of the presence test can be explained by the fact that a jury finding that the witnesses were in the conscious presence of the testator would be clearly against the weight of the evidence, inasmuch as the witnesses left the conference room on each occasion. Thus, under no strained construction could it be said that the witnesses were in the conscious presence of the testator under such circumstances.

Revocation. The Texas Probate Code also requires strict compliance in connection with the revocation of wills. Section 63 of the Code provides that a will may be revoked by a subsequent will, codicil, or declaration in writing executed with like formalities or by the testator's physical act of destruction or cancellation of the will, or by his causing the will to be destroyed or cancelled in his presence.²¹

In *Morris v. Morris*²² the testator directed his wife to destroy his will, allegedly in the presence of the testator's aunt. The testator's wife, however, merely pretended to destroy the will, and she later offered the will for probate. The Texas Supreme Court held that even the testator's clear intent to revoke his will by physical destruction, coupled with his mistaken belief that destruction had occurred, was not sufficient to effectively revoke his will, when in fact the instrument remained intact and was offered for probate.²³ The court concluded that the statutory method of revoking a will remains exclusive. The court explained that "[t]o hold otherwise

16. *Id.*

17. 643 S.W.2d 204 (Tex. App.—Eastland 1982, writ ref'd n.r.e.).

18. *Id.* at 206.

19. *Id.* at 206-07.

20. The trial court in *Morris* presented the special issue as follows: "Do you find from a preponderance of the evidence at the time Evelyn Cole and Judy Hooker signed their names to the February 20, 1979 document they were in the *presence* of C.K. West? Answer: No." *Id.* at 205 (emphasis added).

21. TEX. PROB. CODE ANN. § 63 (Vernon 1980).

22. 642 S.W.2d 448 (Tex. 1982).

23. *Id.* at 450.

would only invite fraud against the estate of a testator whose lips are forever sealed by death."²⁴

The absolute quality of the *Morris* decision is probably misleading even though, for policy reasons, the court was correct in denying relief in the case of the testator's mistake. The court explained that it refused to impose a constructive trust because the contestants failed to establish fraud as a matter of law. The court said the contestants were required to show fraud as a matter of law because they first introduced the issue of fraud at the appellate court level.²⁵ However, the court concluded that a finding of fraud as a matter of law was impossible because the parties provided different factual accounts. In this case the factual discrepancy occurred when the testator's wife contradicted the testator's aunt and denied that the aunt was present at the time the will was allegedly destroyed at the instruction of the testator.²⁶

In *Howard Hughes Medical Institute v. Neff*²⁷ the Howard Hughes Medical Institute filed an application with the Harris County Probate Court for the probate of a lost will allegedly executed by Howard Hughes between 1953 and 1963. The Institute argued in the alternative for the probate of Hughes's lost will allegedly executed in 1925. The Institute claimed it was the primary beneficiary under the more recent will and was the intended beneficiary under the doctrine of cy pres under the 1925 will. During the probate proceedings, the State of Texas and a court-appointed attorney ad litem for unknown heirs moved that the Institute be required to show standing as a party interested in the Hughes estate. In addition, the executors of Hughes's aunt's and cousin's estates each filed a motion for summary judgment. The contestants presented their motions at the same hearing, at which time the probate court rendered judgment in favor of the will contestants and denied and dismissed the Institute's application for probate.

The Institute appealed the probate court order, arguing that summary judgment should have been denied because of secondary evidence introduced at trial to prove the existence of Hughes's lost wills.²⁸ In support of its argument, the Institute cited section 84(b) of the Probate Code²⁹ as "a

24. *Id.*

25. *Id.*

26. *Id.*

27. 640 S.W.2d 942 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

28. *Id.* at 947. The Institute produced the following evidence: two letters to Hughes written by his attorney and referring to Hughes's will; an unsigned file copy of a Hughes will; an original holographic codicil in Hughes's handwriting; and deposition testimony of a former executive in Hughes's company who testified to seeing a document that was purportedly Hughes's will.

29. TEX. PROB. CODE ANN. § 84(b) (Vernon 1980) provides:

Attested Written Will. If not self-proved as provided in this Code, an attested written will produced in court may be proved:

(1) By the sworn testimony or affidavit of one or more of the subscribing witnesses thereto, taken in open court.

(2) If all the witnesses are non-residents of the county, or those who are residents are unable to attend court, by the sworn testimony of any one or

permissive best evidence rule" permitting the use of secondary evidence when the proponent of the evidence can account for the absence of preferred evidence.³⁰ In connection with this section the Institute cited section 88(b) of the Code, which provides that due execution of a will must be proved to the "satisfaction of the court."³¹ The Institute's position apparently was that it needed only to "satisfy the court" in order to obtain probate and that it did not need to be concerned with proving due execution. The appellate court rejected the Institute's argument, stating that the Institute must do more: It must prove to the satisfaction of the court that the testator executed the will in compliance with the formalities and solemnities required by sections 84 and 85 of the Probate Code to make it a valid will.³² Thus, for summary judgment purposes, the question became one of determining whether the parties disagreed about any facts relating to the testator's compliance with the formalities and solemnities required for execution of a valid will. Concluding that the secondary evidence offered did not relate to those formalities and solemnities, the court held that the trial court had not erred in granting summary judgment for the contestants.

The Institute further argued that section 84(b) of the Code, which sets forth the methods for proving the due execution of a will not self-proved, is not mandatory because the section uses the word "may" in listing the ways an attested will may be proved. In support of its contention, the Institute cited *In re Estate of Page*³³ for the general rule that the requirements of section 84 are not mandatory.

The *Hughes* court, however, found *Page* distinguishable from the instant case.³⁴ In *Page* the secondary evidence proffered was the testimony of two witnesses as to the genuineness of the signatures of the testator and

more of them by deposition, either written or oral, taken in the same manner and under the same rules as depositions taken in other civil actions; or, if no opposition in writing to such will is filed on or before the date set for hearing thereon, then by the sworn testimony or affidavit of two witnesses taken in open court, or by deposition in the manner provided herein, to the signature or the handwriting evidenced thereby of one or more of the attesting witnesses, or of the testator, if he signed the will; or, if it be shown under oath to the satisfaction of the court that, diligent search having been made, only one witness can be found who can make the required proof, then by the sworn testimony or affidavit of such one taken in open court, or by deposition in the manner provided herein, to such signatures or handwriting.

(3) If none of the witnesses is living, or if all of such witnesses are members of the armed forces of the United States of America or of any auxiliary thereof, . . . and are beyond the jurisdiction of the court, by two witnesses to the handwriting of one or both of the subscribing witnesses thereto, or of the testator, if signed by him, and such proof may be either by sworn testimony or affidavit taken in open court, or by deposition . . . ; or, if it be shown under oath to the satisfaction of the court that, diligent search having been made, only one witness can be found who can make the required proof, then by the sworn testimony or affidavit of such one taken in open court, or by deposition in the manner provided herein, to such signatures and handwriting.

30. 640 S.W.2d at 947.

31. TEX. PROB. CODE ANN. § 88(b) (Vernon 1980).

32. 640 S.W.2d at 947.

33. 544 S.W.2d 757, 759 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

34. 640 S.W.2d at 948.

the other deceased or unlocated witnesses. The *Hughes* court stated the evidence presented in *Page* was "precisely the kind of secondary evidence that Probate Code § 84(b)(3) requires."³⁵ Therefore, the *Hughes* court concluded, the secondary evidence upon which the Institute relied was not the kind contemplated by section 84(b)(3).³⁶ Furthermore, the *Hughes* court refused some of the evidence offered by the Institute on evidentiary grounds.³⁷ Ultimately the court concluded that the Institute failed to carry its burden of proof with regard to due execution on two grounds: (1) it failed to establish the identity of the attesting witnesses and, without this information, the burden of proving due execution became very difficult; and (2) it failed to satisfy the requirements of section 85 of the Code, controlling manner of proof of due execution, which, unlike the best evidence rules of section 84, are mandatory.³⁸

The court also addressed the issue of the Institute's standing to make application for the probate of Hughes's will. Initially, the court cited *Hamilton v. Gregory*³⁹ for the general rule that while "it is not necessary [for the proponent] to develop facts necessary to entitle [the will] to probate," the proponent must "show that he was named as a beneficiary in a testamentary instrument executed with the formalities required by law, that is, a will."⁴⁰ The *Hughes* court stated that the Institute failed to raise a fact issue with regard to the due execution of either of the wills and held that the Institute lacked the requisite standing to apply for probate of the lost will.⁴¹ Furthermore, the court stated that the Institute was not named in the 1925 will and that the doctrine of cy pres did not apply because no legal or practical impediment prevented carrying out the charitable bequest described in the alleged 1925 will.⁴²

Definition of Mental Capacity. In *Wolters v. Wright*⁴³ the trial court submitted the following special issue regarding testamentary capacity to the jury:

By the term "testamentary capacity" is meant that the person making the will must, at the time the will is executed, have sufficient mental ability to understand the business in which he is engaged, the effect of his acts in making the will, the capacity to know the objects of his bounty and their claims upon him, and the general nature and extent of his property.⁴⁴

The will contestants, relatives of the decedent, argued that the trial court erred in refusing to instruct the jury also that in order to have the requisite

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. 482 S.W.2d 287 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ).

40. *Id.* at 289.

41. 640 S.W.2d at 953.

42. *Id.*

43. 649 S.W.2d 649 (Tex. App.—Texarkana 1982, writ ref'd n.r.e.).

44. *Id.* at 650-51.

mental capacity the testator had to have the ability to "collect in his mind the elements of the business to be transacted and to hold them long enough . . . to be able to form a reasonable judgment as to them."⁴⁵ Upholding the trial court, the court of appeals stated that the test of sufficiency of a definition turns on whether it allows the jurors to understand the term it defines; the court held that the definition in the instant case adequately explained mental capacity to the jury.⁴⁶

Mental Capacity/Undue Influence. In *Croucher v. Croucher*⁴⁷ Virginia Croucher appealed an order of the probate court that held her deceased husband's will to be null and void. Virginia's husband, James Croucher, executed his will in July 1980 and died in August 1980. Initially, Croucher's will, which named Virginia as sole beneficiary and independent executrix, was admitted to probate. The testator's children from a previous marriage, however, contested the admission of the will to probate, claiming that their father was not of sound mind at the time he executed the will. The contesting children also argued that Virginia exerted undue influence over their father at the time of the will's execution.

At trial, the will contestants produced evidence showing that their father had been seriously ill two or three years prior to his death, that he had become confused, and that his memory had become sketchy. Furthermore, Croucher's medical records reflected that five days prior to his death Croucher experienced "decreasing mental status."⁴⁸ Mrs. Croucher, however, introduced evidence suggesting that her husband was alert and mentally competent just before and at the time of the execution of his will.

In response to the issue of the testator's mental capacity, the court of appeals relied on *Lee v. Lee*⁴⁹ for the Texas rule with regard to testamentary mental capacity. The *Croucher* court stated:

In *Lee* . . . the court said the inquiry in a will contest on the ground of testamentary incapacity is the condition of the testator's mind on the day the will was executed. The court also said:

However, only that evidence of incompetency at other times has probative force which demonstrates that the condition persists and "has some probability of being the same condition which obtained at the time of the will's making."⁵⁰

Based on the authorities cited, the court of appeals held that the evidence advanced at trial was insufficient to support the trial court's conclusion that Croucher lacked testamentary capacity at the time of the execution of his will.⁵¹ The court recognized that although the medical records reflected substantial physical problems, mental capacity could not

45. *Id.* at 651.

46. *Id.*

47. 654 S.W.2d 475 (Tex. App.—El Paso 1982), *rev'd*, 660 S.W.2d 55 (Tex. 1983).

48. 654 S.W.2d at 476.

49. 424 S.W.2d 609 (Tex. 1968), *cited in Croucher*, 654 S.W.2d at 477.

50. 654 S.W.2d at 477.

51. *Id.*

be discerned merely from physical infirmity. Finding nothing in the medical records to reflect that on the date of the making of the will Croucher lacked testamentary capacity, the court held the will was properly admitted to probate.⁵² In addition, the court found no evidence to support the allegation of undue influence by Virginia at the time her husband's will was executed.⁵³ The court refused to set aside the will "on proof of facts which do no more than show an opportunity to exercise influence."⁵⁴

The supreme court reversed, however, on the ground that Mrs. Croucher failed to prove as a matter of law that Mr. Croucher had the requisite testamentary capacity.⁵⁵ The supreme court held that the evidence adduced at the trial court by the Croucher children was sufficient to raise a question of fact as to Mr. Croucher's testamentary capacity.⁵⁶ The court therefore reinstated the trial court's judgment.⁵⁷

Cases like *Croucher* raise an interesting question. Clearly, the burden of proving testamentary capacity is on the proponent of the will. But in the absence of any legislative authorization of pre-death adjudication of testamentary capacity, will preparers are often left with a dilemma. When the prospective testator suffers any physical or mental disability, even advancing age, the post-death opportunity to assert lack of capacity will always exist. While conventional wisdom suggests that will contests should be "tried when signed," the opportunity for unequivocally establishing capacity is sometimes absent at that time. In such a case, one conclusion is that the testator should be deprived of the opportunity of making a will. As a matter of policy, however, the attorney should probably encourage the testator to execute the will and depend upon the testator's heirs, through the judicial system, to determine capacity in cases in which the will is not to their liking. The alternative would be for one person, usually the preparer of the will, to be forced to make determinations at the time of execution that he has neither the competence nor the authority to make. The problem is particularly acute when a disposition does not favor the testator's heirs, perhaps because they are remote relatives, but is perfectly "natural" in the sense of favoring persons close to the testator.

Joint Wills. Joint wills continue to be a problem, although circumstances warranting the execution of a joint will are difficult if not impossible to imagine. In Texas the courts have held that the primary factor in determining whether a joint will is contractual in nature and therefore binding on both parties is whether "the will, as a whole, sets forth a comprehensive plan for disposing of the whole estate of either or both [of the testators]."⁵⁸

52. *Id.*

53. *Id.*

54. *Id.*

55. 660 S.W.2d 55, 58 (Tex. 1983).

56. *Id.*

57. *Id.*

58. *Murphy v. Slaton*, 154 Tex. 35, 43, 273 S.W.2d 588, 593 (1954); *Fisher v. Capp*, 597 S.W.2d 393, 398 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.).

The party contending that a joint will is contractual in nature bears the burden of proving that a contract between the testators existed.⁵⁹ The proponent of the contract theory may utilize the will provisions alone or in combination with extrinsic evidence to meet this burden.⁶⁰ Will provisions that characterize the property of both testators as one estate and provide for the disposition of such property at the death of the surviving testator, as well as at the death of the predeceasing testator, are strong evidence of the contractual relationship between the testators.⁶¹

In *Trlica v. Bunch*⁶² the will provided for a comprehensive plan that included the disposition of the estate at the death of the surviving testator. Although the will in *Trlica* used the term "fee simple" to describe the estate that was to pass to the survivor of the two testators, the court held that such terminology was not conclusive evidence of the lack of a contractual will.⁶³ The *Trlica* court further held that when the document was reviewed in its entirety, the intent of the testators was clearly to create a mutual contractual obligation.⁶⁴

The court in *Cox v. Rice Trust, Inc.*,⁶⁵ however, held that the joint will in question imposed no contractual obligation on the surviving testator because of the clarity of the first paragraph of the will, which provided for the vesting of a fee simple estate in the surviving testator.⁶⁶ The third paragraph of the will created a remainder interest that would vest in the designated legatees in the event of the simultaneous death of both testators, or would vest in the surviving testator in the event that one testator should predecease the other. In light of the clear language in the first paragraph, the court held that the phrase "or if one of us should have predeceased the other" in the third paragraph of the will was ambiguous and out of place in the testator's general scheme of testamentary disposition, and the will therefore did not create a joint and mutual obligation.⁶⁷ In support of its holding the court of appeals cited the rule of construction pronounced in *Gilliam v. Mahon*⁶⁸ that if the language of the first clause of a will is clear and unambiguous, then the estate bequeathed by that first

59. *Nye v. Bradford*, 144 Tex. 618, 623, 193 S.W.2d 165, 167 (1946).

60. *Id.* at 623, 193 S.W.2d at 167-68.

61. *Id.*

62. 642 S.W.2d 540 (Tex. App.—Dallas 1982, no writ).

63. *Id.* at 543.

64. *Id.* The *Trlica* court stated:

[T]he language creating the first estate is not controlling because the primary factor is whether the testators have agreed to the disposition of the estate remaining in the hands of the survivor. Neither can we agree that the use of the language "dispose of" in the third paragraph indicates that the testators did not intend to be contractually bound by the provisions of the joint will. Although this language gives the survivor the right to dispose of the estate during his or her lifetime, it does not exclude a contractual obligation not to make a different disposition by will.

Id.

65. 648 S.W.2d 758 (Tex. App.—Tyler 1983, no writ).

66. *Id.* at 760.

67. *Id.*

68. 231 S.W. 712 (Tex. Comm'n App. 1921, judgment adopted).

clause shall not be diminished by a subsequent clause that employs ambiguous or uncertain language.⁶⁹ The court in *Cox* therefore held that a fee simple estate was created in the surviving testator and that this estate was not affected by the uncertain and ambiguous language in the third paragraph of the will.⁷⁰

*Perl v. Howell*⁷¹ involved a joint will that contained several provisions evidencing a comprehensive plan for the disposition of the two testators' property. The *Perl* court held that the will treated the husband's and wife's estates as one, disposing of the estate property only at the deaths of both spouses.⁷² The court further found that nowhere in the will did the testators attempt to dispose of their individual interests. Therefore, the *Perl* court held, the will evidenced the mutual intent of the testators to create a contract.⁷³

Construction. Will construction involves the process of ascertaining the testator's intention. Ideally, each testator would speak unequivocally and unambiguously in expressing his testamentary scheme. In those instances when the testator's intention is unclear, however, the court must construe the will. In so doing, the courts have developed certain rules of construction. Texas courts supposedly look at the testamentary document as a whole as well as the circumstances surrounding execution of the will to ascertain the testator's intent.⁷⁴

*In re Estate of Haldiman*⁷⁵ involved the construction of a holographic will. The Haldiman will listed five specific cash bequests followed by the phrase "the money left over after all is paid, to go to [certain charities]."⁷⁶ The document was then signed and witnessed. A sheet of paper listing the names and addresses of everyone named in the will was attached to the handwritten instrument. The court found the phrase "the money left over after all is paid" to be ambiguous because, while it appeared to be an attempt to dispose of the remainder of the testator's estate, the phrase only stated that the remaining money from the estate should be paid to the enumerated charities.⁷⁷ The court therefore reviewed the will provisions as a whole and the surrounding circumstances at the time of the will's execution. The court concluded that the testator's intent was that this phrase have the effect of a general residuary clause.⁷⁸

69. *Id.* at 713, cited in *Cox*, 648 S.W.2d at 760.

70. 648 S.W.2d at 760.

71. 650 S.W.2d 523 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

72. *Id.* at 525.

73. *Id.*

74. See *Silverthorn v. Jennings*, 620 S.W.2d 894, 896 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.); *Pruett v. Berkeley*, 405 S.W.2d 433, 435 (Tex. Civ. App.—Waco 1966, no writ).

75. 653 S.W.2d 337 (Tex. App.—San Antonio 1983, no writ).

76. *Id.* at 338.

77. *Id.* at 339.

78. *Id.* The *Haldiman* court based its construction of the will on other Texas cases applying rules of will construction. *Id.* (citing *Shriner's Hospital for Crippled Children v. Stahl*, 610 S.W.2d 147, 151 (Tex. 1980) (mere making of will creates presumption that testa-

In another recent case, *House v. Republic Bank Brownwood*,⁷⁹ the wills of Charles Sandler and his wife each provided for the establishment of a testamentary trust for the benefit of the testator's children or, if the children should be deceased at that time, for the benefit of their grandchildren. With regard to the trust, each will contained a provision stating, "[The Trustee] is authorized to pay . . . the net income from the trust estate herein created to our two children, equally, or if one of them should pass away, the deceased child's one half shall be paid to the *legal guardian* of the children of such deceased child."⁸⁰

The issue on appeal was whether the testators intended that the trust income was to be paid only to those grandchildren having a legal guardian. Such a construction would have the effect of prohibiting the testators' adult grandchildren from receiving trust income. After reviewing the testators' wills as a whole and the circumstances surrounding their execution, the court rejected this construction. The court construed the wills to mean that upon the death of the testator, his half of the estate would be paid equally to his children, but if any child at the time of the testator's death was either a minor or incompetent, then that child's interest in the trust was to be paid to the child's guardian.⁸¹

Ademption by Extinction/Premortem Accessions. Undoubtedly every testator will confront change after the execution of his or her will. Change in property arises from extinction or acquisition. This potential for change places an enormous burden on will preparers, who are charged with anticipating that change or suffering the potential disaster of litigation over the meaning of provisions in the will that fail to take account of the potential for change completely. It should be clear, however, that even the most conscientious of practitioners who make reasonable efforts to anticipate change cannot prevent litigation growing out of changes occurring subsequent to a will's execution. *Guy v. Crill*⁸² is illustrative.

Miriam Grice's will provided for seven separate bequests, each consisting of a fractional share of the testatrix's interest in First National Bank in Dallas. The will stated that each beneficiary was to receive a certain amount of First National stock, together with all dividends and other attendant rights and benefits at the time of the testatrix's death. The instrument further provided that the residue of the estate was to pass to certain residual beneficiaries. After the execution of Grice's will, but before her death, the testatrix's shares in First National Bank were exchanged for shares in First International Bancshares, due to a reorganization in First

tor did not intend to die intestate); *Welch v. Staach*, 531 S.W.2d 319, 321 (Tex. 1975) (informal language used by layman construed liberally to respect testator's intent); *Haynes v. Henderson*, 345 S.W.2d 857, 861 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.) (words "sum" or "money" construed liberally to include all kinds of personal or real property)).

79. 641 S.W.2d 663 (Tex. App.—Eastland 1982, no writ).

80. *Id.* at 665 (emphasis supplied by court).

81. *Id.*

82. 654 S.W.2d 813 (Tex. App.—Dallas 1983, no writ).

National's capital structure. At the time of Grice's death, her estate consisted primarily of the stock holdings described in the specific bequests and, therefore, her residuary estate was insufficient to cover estate taxes and expenses. Accordingly, the court ordered that the specific bequests of stock were to be reduced proportionately to pay the estate taxes and costs of administration. Thereafter, the remaining shares of stock were delivered to the legatees named in the will.

The residual beneficiaries in *Crill* argued, however, that the specific bequests of stock were adeemed at the time the testatrix received Bancshares stock in replacement of First National stock. The residual beneficiaries also contended that the phrase "together with all dividends, rights and benefits declared thereon at the time of my death, and all rights and benefits thereof"⁸³ was a dividend declared clause that entitled the named beneficiaries only to the dividends, rights, and benefits declared but not received on the testatrix's date of death. There being no such dividends, rights, or benefits, the residual beneficiaries argued that all of Grice's stock passed to the residuary estate.

The *Crill* court rejected the theory of ademption, holding that the testatrix's intent was merely to include in the bequest all the rights and benefits flowing from her ownership of the First National Bank stock.⁸⁴ The court further held that "any change in the shares, whether of form or substance, is immaterial."⁸⁵ In addition, the court disagreed with the residuary beneficiaries' construction of the quoted provision and held that the "all rights and benefits thereof" provision was intended to broaden, not limit, the scope of the specific bequests.⁸⁶

The residual beneficiaries in *Crill* also contended that the residuary clause by itself entitled them to receive all of the Bancshares stock inasmuch as the clause provided that all of the property the testatrix acquired after the execution of her will was to pass to the residuary estate. Because the Bancshares stock was acquired after the execution of the will, the residual beneficiaries argued that the stock passed to them. Again the court held that the stock was not part of the residuary estate because the conversion of the First National Bank stock into Bancshares stock constituted one of the rights and benefits of ownership of the stock the testatrix had bequeathed.⁸⁷ The residuary beneficiaries argued, in the alternative, that the trial court erred in granting the legatees of the stock the right to receive stock dividends as well as stock splits due to the ownership of the stock since the date of the will. The court held that the trial court did not err in granting all benefits to the legatees, stating that stock dividends and stock splits are also rights and benefits flowing from ownership of the original bank stock and, consequently, were included in the bequest.⁸⁸

83. *Id.* at 815.

84. *Id.* at 816.

85. *Id.*

86. *Id.*

87. *Id.* at 816-17.

88. *Id.* at 817.

Trusts for Benefit of Incompetents. In *State v. Whitaker*⁸⁹ a probate court held that a will and codicil created a testamentary trust for the specific purpose of paying burial expenses upon the death of the testatrix's two incompetent sons. The testatrix appointed the executor of her estate as the legal guardian of the estates and persons of her two sons. The testatrix further designated the legal guardian of the estates of her two sons as the beneficiary under her life insurance policy. The State of Texas brought suit against the sons' guardian in an attempt to recover expenses incurred by the state for the care, support, and maintenance of the two sons in a state school under the terms of section 61(b) of article 5547—300.⁹⁰ The probate court held that the corpus of the wards' estate was derived from proceeds of the life insurance on their mother's life and that, in reality, the estate was a trust for the benefit of the two sons as contemplated by the Texas Legislature in section 61(a)-(g) of the statute.⁹¹

Article 5547—300, section 61(b) provides that a mentally retarded person is liable for the expense of his support and maintenance except as provided by section 61(g).⁹² Section 61(g) states that a ward of the state is not liable for the expense of his maintenance and support if the ward's estate consists of a beneficial interest in a trust with an aggregate value not exceeding \$50,000.⁹³ Because the proceeds from the policies funding the corpus of the guardianship, which the probate court held to be a trust, were less than \$50,000, the probate court held the state was precluded from reaching the trust property to satisfy the sons' support expenses.

The Waco court of appeals held, however, that the guardianship created under the testatrix's codicil to her will was not in substance a trust for the benefit of the testatrix's two sons.⁹⁴ Furthermore, the court stated, the four corners of the testatrix's will and codicil and the circumstances surrounding its execution indicated that a trust was not created by implication.⁹⁵ The testatrix originally executed a will providing for the creation of a trust for the support and maintenance of her two sons, naming her executor as guardian over only the persons of her two sons. By a codicil to her original will the testatrix revoked the provision that created the support and main-

89. 638 S.W.2d 189 (Tex. App.—Waco 1982, no writ).

90. TEX. REV. CIV. STAT. ANN. art. 5547—300, § 61(b) (Vernon Supp. 1984).

91. 638 S.W.2d at 190.

92. TEX. REV. CIV. STAT. ANN. art. 5547—300, § 61(b) (Vernon Supp. 1984) provides:

Parents of a mentally retarded person who is 18 years of age or older shall not be required to pay for his support and maintenance as a resident in a residential care facility operated by the department, but the mentally retarded person and his estate shall be liable for his support and maintenance regardless of his age, except as provided in Subsection (g) of this section.

93. *Id.* § 61(g) provides:

For the purposes of this subchapter no portion of the corpus or income of a trust or trusts, with an aggregate principal amount not to exceed \$50,000, of which a mentally retarded person is a beneficiary shall be considered to be the property of such mentally retarded person or his estate, and no portion of the corpus or income of such trust shall be liable for the support and maintenance of such mentally retarded person regardless of his age.

94. 638 S.W.2d at 191.

95. *Id.*

tenance trust and the provision naming the executor as guardian over the persons of her two sons and thereafter created an express trust for the sole purpose of paying for the sons' burial expenses. In addition, the codicil renamed the executor as guardian of both the persons and the estates of the incompetent sons. The *Whitaker* court therefore concluded that the principal of the sons' estates was held by the testatrix's executor as a guardian rather than as a trustee and, therefore, the principal was subject to the state's claims for expenses incurred on behalf of the sons while they were under state care.⁹⁶

Title Questions During Estate Administration. A vexing problem in the administration of many estates is the question of when the administration is complete. The issue becomes particularly important in the income tax context because of the estate's utility as a tax shelter, which stems from the fact that income received by the estate is taxed to the estate unless it is distributed to the estate's beneficiaries.⁹⁷ Thus, the first dollars of income the estate receives will be taxed at lower rates than if these dollars were taxed to the beneficiaries and stacked on top of the beneficiaries' other income. Accordingly, in many instances, the beneficiaries want to keep the estate open as long as possible. For this reason, the Treasury has taken the position that the estate may remain open, for income tax purposes, only for a reasonable period of time to complete the administration of the estate.

In *Larson v. Enserch Exploration, Inc.*⁹⁸ Stella Bryant's will created a testamentary trust for her seven brothers and sisters. The will appointed three of the testatrix's brothers to serve as independent executors and directed them to file a final report with the county probate court. The will further provided that the balance of the estate was to pass automatically to the Stella Bryant trust. All real estate owned by Bryant was to be operated by the executors for three years before passing into the trust. The will also appointed three of Bryant's brothers, including two of the executors, to serve as trustees under the testamentary trust, which was to contain the real and personal property shown in the executors' final report. The testamentary trust was to continue for ten years from the date of the filing of the final report.

Before the final report was filed, one of the testatrix's brothers, as executor, executed an oil and gas lease to Enserch. Thereafter, two other brothers, in their capacities as trustees, leased the identical mineral interest to a third party, who subsequently assigned the lease to Larson. Larson and the two trustees who had leased the mineral interest to Larson's assignor brought suit to clear title to Larson's interest.

The court examined Bryant's will to determine whether the trustees or executors controlled the assets of her estate at the time the leases were executed. The court found that Mrs. Bryant intended that a final report be

96. *Id.* at 191-92.

97. I.R.C. §§ 661-662 (1982).

98. 644 S.W.2d 61 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.).

filed by the executors of her estate before the residue would pass to the trust.⁹⁹ The *Larson* court concluded that the trustees therefore lacked authority to execute an oil and gas lease to Larson's assignor, because the filing of the final report constituted a condition precedent to the activation of the trust and the commencement of the duties and powers of the trustees.¹⁰⁰ Until the filing of the final report occurred, "neither the property in the trust nor the term of the trust [was] known."¹⁰¹ Inasmuch as the report had not been filed, the *Larson* court held that the trust had not yet been activated, and thus the trustees lacked authority to execute a lease on behalf of the trust.¹⁰² The *Larson* case therefore suggests that an estate can remain open indefinitely. While this may be true for state law purposes, it is not true for federal income tax purposes.

Larson also raises the question of title. In particular, the case raises the issue of who has title to the decedent's property during administration. Whether title is in the executor or in the beneficiaries remains unclear. The court in *Larson* said, essentially, that title is wherever the testator puts it and, in the *Larson* case, the testatrix gave title to her executors and not to the beneficiaries of her estate, her trustees.

Adoption of an Adult. In *Foster v. Foster*¹⁰³ the court was confronted with the old but infrequently encountered problem of whether an adult can be adopted into the line of descent. More precisely, the question was whether *B*, the child of *A*, could adopt *C*, an adult, and thereby cause *C* to have the same claims against *A*'s estate as a natural child of *B* would have. The *Foster* court held that, for purposes of the law of descent and distribution in Texas, an adult cannot be adopted into the line of descent so as to have the rights enjoyed by a natural child against the estate of the adoptive parent's ancestors.¹⁰⁴

The court noted the general rule that a child, within the meaning of the Family and Probate Codes,¹⁰⁵ was a person under the age of twenty-one or an age otherwise prescribed by statute defining majority. The court relied on this definition of children and held that article 46a, section 9 of the Texas Revised Civil Statutes, which allows an adoptive child to inherit from his adoptive parents, does not allow an individual who was an adult when adopted to inherit through his adoptive parents under the intestate succession laws of Texas.¹⁰⁶ In summary, a natural child clearly can inherit *from* and *through* his parents. Similarly, a child adopted while under the age of twenty-one, can inherit *from* and *through* his adoptive parents.

99. *Id.* at 63.

100. *Id.*

101. *Id.*

102. *Id.*

103. 641 S.W.2d 693 (Tex. App.—Fort Worth 1982, no writ).

104. *Id.* at 695.

105. TEX. FAM. CODE ANN. § 16.55 (Vernon Supp. 1984); TEX. PROB. CODE ANN. § 3(b) (Vernon 1980).

106. 641 S.W.2d at 695 (citing TEX. REV. CIV. STAT. ANN. art. 46a, § 9 (Vernon 1969)).

After *Foster*, however, a person adopted while an adult can only inherit from his adoptive parents, not *through* them.

II. TRUSTS

Texas Trust Code. Clearly the most important development pertaining to trusts in Texas was the adoption of the Texas Trust Code.¹⁰⁷ The Trust Code, together with the Texas Trust Act,¹⁰⁸ is to "be considered one continuous statute."¹⁰⁹ The provisions of the Trust Code apply to all trusts created after January 1, 1984, as well as to "all transactions occurring on or after January 1, 1984, relating to trusts created before January 1, 1984." While a discussion of the Trust Code is beyond the scope of this survey, it is appropriate to note that the committee responsible for development of the Trust Code determined that the existing Texas Trust Act was "fundamentally sound" and that the "policy of each substantive provision of the Act should be continued."¹¹⁰ Notwithstanding this objective, the Texas Trust Code significantly expanded the subjects addressed by Texas trust legislation and, for that reason, the Trust Code requires careful examination.

Trusts as Testamentary Substitutes. The Texas courts continue to take a liberal view of the use of a revocable trust as a testamentary substitute, notwithstanding the long standing notion that the policy of the wills act requires all testamentary devices to be executed in literal compliance with the formalities specified in the statute governing the execution of wills.¹¹¹ The literal compliance requirement grew out of judicial concern that, without such specific compliance, the opportunity for fraud and forgery would be enlarged. Moreover, the required formalities induce a reflective state of mind in the testator.

Without doubt the revocable trust should enjoy exception from the requirements of the wills act when the concerns that prompted development of the literal compliance requirement are not present. For example, it is most evident that fraud and forgery are absent in cases in which the revocable trust is funded during the testator's lifetime and the trust is not self-trusteed. In such a case the settlor has had the opportunity not only to execute the writing that purports to be the trust agreement, but he or she has also actually transferred property to the trustee during his or her lifetime and had the opportunity to see the trust in operation. While such

107. Texas Trust Code, ch. 567, § 2, 1983 Tex. Gen. Laws 3269 (codified at TEX. PROP. CODE ANN. §§ 111.001-115-017 (Vernon Pam. 1983)).

108. TEX. REV. CIV. STAT. ANN. arts. 7425b-1 to -47 (Vernon 1960 & Supp. 1982-1983) (now codified as amended at TEX. PROP. CODE ANN. §§ 111.001-113.152, 114.001-115.016 (Vernon Pam. 1983)).

109. Texas Trust Code, ch. 567, § 2, 1983 Tex. Gen. Laws 3269, 3271 (codified at TEX. PROP. CODE ANN. § 111.002(b) (Vernon Pam. 1983)).

110. STATE BAR OF TEXAS, SECTION OF REAL ESTATE, PROBATE AND TRUST LAW, GUIDE TO THE TEXAS TRUST CODE 2 (1983).

111. See TEX. PROP. CODE ANN. § 59 (Vernon 1980). See generally Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975).

circumstances are no guarantee that the settlor understands how the property will be disposed of after his or her death, the more extensive participation by the settlor with the revocable trust during his or her lifetime should provide more assurance than is present with a will that the settlor knew and understood the contents of the instrument. In the case of a self-trusteed revocable trust, less certainty exists that the opportunity for fraud and forgery has been minimized, particularly when the settlor did not formally transfer property to the trust during his or her lifetime. The Texas cases recently decided illustrate the growing popularity of the revocable trust and the attitude of the courts toward these will substitutes.

In *Wilkerson v. McCleary*¹¹² the court scrutinized the validity of four "Dacey" inter vivos trusts, which were each created by a declaration of trust. In Texas an express trust may be created by a written declaration by the owner of the property that he holds the property as trustee for another.¹¹³ The *Wilkerson* court addressed collectively the validity of three of the four trusts containing similar provisions. Each of the three trust declarations provided that the settlor was to act as trustee of the property mentioned in each instrument for the benefit of Jeanette Wilkerson. In the event of the settlor's death or legal incapability, the instrument directed that Jeanette Wilkerson was to be appointed successor trustee, her sole duty being to transfer the property to herself free of trust. In addition, the settlor trustee retained extensive control over the use and disposition of the property in each trust, which consisted of real estate, stock, household furnishings, and the personal effects of the settlor.

Upon creation of the trusts, the settlor failed to transfer the deed to the real estate to herself as trustee. Furthermore, she did not request the reissuance of stock certificates to herself as trustee nor did she execute a deed to herself as trustee of the premises where the personal property sat in storage. The issue on appeal turned on whether the failure of the settlor to transfer the trust property formally to herself as trustee invalidated the trusts. The appellate court held that the trusts were valid, basing its opinion on the rationale in *Westerfield v. Huckaby*¹¹⁴ that a trust comes into existence because it contains a lifetime purpose and not because of the simultaneous occurrence of a declaration of trust and transfer of deeds.¹¹⁵ The court also stated that although Texas statutes provide that a declaration of trust over real property will be invalid unless created by a written

112. 647 S.W.2d 79 (Tex. App.—Beaumont 1983, no writ).

113. TEX. PROP. CODE ANN. § 112.001(1) (Vernon Pam. 1983) (formerly codified at TEX. REV. CIV. STAT. ANN. art. 7425b—7 (Vernon 1960)).

114. 474 S.W.2d 189 (Tex. 1971).

115. *Wilkerson*, 647 S.W.2d at 80. The *Wilkerson* court stated:

The gravamen of *Westerfield* is not the deed and declaration of trust combination; rather, it is because the trusts contained a lifetime purpose that the court upheld them against the challenge of being sham trusts. Like the trust at bar, the successor trustee was to succeed the settlor trustee in the event of the settlor trustee's death or *incapacity*.

Id. (emphasis in original).

instrument subscribed by the settlor,¹¹⁶ Texas courts have held that, with respect to a real estate trust, parol evidence may be used to establish a constructive trust over real estate, even though the deed to such real estate is ambiguous on its face.¹¹⁷

The declaration of the fourth trust in *Wilkerson* provided that the settlor was holding a checking-savings account at the Home Savings & Loan Association in trust for a named beneficiary. At the time of the declaration, the settlor owned four accounts at the savings and loan, but the declaration did not indicate which account was the trust property. The court concluded from the singular language used in the trust declaration that the settlor intended only one of her four accounts to be held in trust.¹¹⁸ Since it was impossible from the language of the declaration, however, to determine which of the four accounts represented the trust res, the court held that the trust failed for lack of certainty.¹¹⁹

In *Cisneros v. San Miguel*¹²⁰ Juan Cisneros placed a real estate lien note and deed of trust, which he received in the sale of certain realty, in Union National Bank of Laredo pursuant to a trust agreement with the bank. Under the terms of the agreement, the bank held the property for Cisneros's benefit and, if Cisneros should die intestate, the property was to pass to a named beneficiary. Upon Cisneros's death the bank filed an interpleader action to determine the proper owner of the trust proceeds. The sole issue on appeal was whether the trust agreement between Cisneros and the bank created a valid inter vivos trust. Cisneros's wife contested the trust's validity. She argued that the trust agreement was testamentary in nature because the beneficiary would receive property only on the death of the settlor and that consequently a valid trust relationship did not exist between Cisneros and the bank. Mrs. Cisneros argued, moreover, that the agreement was not a valid testamentary document because the parties had not complied with the formalities for creation of a testamentary instrument as provided in section 59 of the Probate Code. The San Antonio court of appeals held, however, that the agreement between Cisneros and the bank created a valid inter vivos trust.¹²¹ The court noted that a majority of cases now uphold the validity of an inter vivos trust even though the settlor reserves a life estate combined with the authority to manage, alter, and revoke the trust.¹²²

116. TEX. REV. CIV. STAT. ANN. art. 7425b—7 (Vernon 1960) (current version at TEX. PROP. CODE ANN. § 112.004 (Vernon Pam. 1983)).

117. 647 S.W.2d at 81 (citing *May v. Little*, 473 S.W.2d 632, 636 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.); *Purcell v. Snowden*, 387 S.W.2d 138, 141-42 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.)). The *Wilkerson* court stated: "Inasmuch as a court is permitted to use its equitable powers to impose a trust on a deed based on parol evidence, it follows a court must be allowed to impose a trust based on more solid evidence such as written and recorded declaration of trust on a deed." 647 S.W.2d at 81.

118. *Id.*

119. *Id.*

120. 640 S.W.2d 327 (Tex. App.—San Antonio 1982, no writ).

121. *Id.* at 330.

122. *Id.* at 330 (citing *Westerfeld v. Huckaby*, 462 S.W.2d 324 (Tex. Civ. App.—Houston [1st Dist.] 1970, *aff'd*, 474 S.W.2d 189 (Tex. 1971)).

Invasion of the Trust Corpus. In *Dahl v. Akin*¹²³ Lille E. Dahl's will created a testamentary trust for the benefit of her husband, George Dahl, and her daughter, Gloria Akin. The will provided for the distribution of income and corpus to George Dahl in the event his other sources of income became insufficient to allow him to "maintain . . . the station of life to which he is accustomed."¹²⁴ Although the will named Dahl as trustee, it gave Gloria Akin sole discretion in the distribution of trust assets to her father. The will further provided that the net income remaining after distributions to Dahl was to be paid to Akin at the discretion of Dahl, as trustee. Several years after the creation of the trust, Akin made three loans to Dahl, using income distributed to her under the provisions of the trust. Thereafter differences arose between Dahl and his daughter. Akin sued and recovered a judgment against Dahl for the loan amounts due.

On appeal, Dahl argued that because his present income would not enable him to both satisfy his indebtedness and maintain his accustomed lifestyle, the assets of the trust should be used to satisfy the judgment. The court held that Lille Dahl did not intend that trust assets be used to pay the indebtedness of George Dahl.¹²⁵ The court added, however, that if Dahl's payment of his obligation to Akin decreased his income below his accustomed standard of living, then Dahl would have recourse to call upon the trust for distributions of income and/or corpus.¹²⁶

Duty of Trustees. In the past, Texas courts have imposed a high standard of care upon the trustee, who holds a fiduciary position with regard to the settlor and the beneficiaries.¹²⁷ Accordingly, the courts have required trustees to make full disclosure to both settlor and beneficiary of all facts and circumstances within their knowledge relating to the management of the trust.¹²⁸

In *Montgomery v. Kennedy*¹²⁹ the beneficiary of a testamentary trust claimed that the acting trustee breached his fiduciary duty. Jack Wilkerson's will created three testamentary trusts, each funded from the residue of his estate. The will named Wilkerson's wife as the life beneficiary of the first trust and his two children, Virginia Montgomery and Jack Wilkerson, as life beneficiaries of the remaining two trusts. The will also provided that the remainder interest under all three trusts was to pass to Wilkinson's grandchildren. Wilkerson's wife and son were appointed trustees of the three trusts. In 1974, prior to the funding of the Wilkerson trust, Virginia

123. 645 S.W.2d 506 (Tex. App.—Amarillo 1982), *aff'd*, 27 Tex. Sup. Ct. J. 23 (Oct. 8, 1983).

124. *Id.* at 509.

125. *Id.* at 524-25.

126. *Id.*

127. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 513-14 (1942); *Montgomery v. Kennedy*, 651 S.W.2d 814, 818 (Tex. App.—El Paso 1983, no writ).

128. *Johnson v. Peckham*, 132 Tex. 148, 152, 120 S.W.2d 786, 788 (1938); *Montgomery v. Kennedy*, 651 S.W.2d 814, 818 (Tex. App.—El Paso 1983, no writ); *Kunz v. Huddleston*, 546 S.W.2d 685, 688-89 (Tex. Civ. App.—El Paso 1977, writ *ref'd n.r.e.*).

129. 651 S.W.2d 814 (Tex. App.—El Paso 1983, no writ).

Montgomery initiated negotiations with her brother, Jack, to sell her trust interests and stock ownership in the family-held business to him. All parties to the negotiations were represented by separate counsel. Ultimately the parties reached a settlement, of which they obtained court approval, and Virginia Montgomery sold her trust interest. The order approving the settlement also released the Wilkerson estate from any further claims by Virginia Montgomery.

Virginia subsequently learned of oil and gas discoveries on the property that was subject to the agreement, and she filed suit to have the settlement agreement and release set aside and the testamentary trust reinstated. She argued that she was entitled to an equitable bill of review on the ground that her brother Jack, as trustee, fraudulently failed to disclose relevant information concerning the value of the subject property during the negotiations for the sale of her interest.¹³⁰ In disallowing Montgomery's contention, the court enumerated the requisite elements of an equitable bill of review. To be entitled to an equitable bill of review to set aside an earlier final judgment, a party must allege and prove that he had a meritorious claim or defense, that he was prevented from making the defense by the fraud, accident, or wrongful act of the opposite party, and that his failure to make the defense did not result from any fault or negligence of his own.¹³¹

The court found that Jack owed a duty of disclosure to Virginia during the sale negotiations, and that he had breached this duty by failing to disclose all information known to him regarding the value of the mineral rights in the Wilkerson estate.¹³² The court, however, held that the controlling issue concerned whether Jack's acts constituted extrinsic or intrinsic fraud.¹³³ The court explained that extrinsic fraud involves a wrongful act by a party to a suit that prevents the losing party from knowing his rights or defenses, thus denying him the opportunity to litigate his case fully.¹³⁴ Only extrinsic fraud entitles a complainant to relief. Intrinsic fraud, though not a ground for vacating a final judgment in an independent suit, includes fraudulent matters actually presented to and considered by the trial court, such as fraudulent instruments or perjured testimony.¹³⁵

The court determined that Jack's actions constituted only intrinsic fraud

130. Initially, Montgomery argued that the judgment concerning the previous settlement was not binding upon the parties, as no controversy was pending at the time of trial. The court, however, held that TEX. REV. CIV. STAT. ANN. art. 7425b-24 (Vernon 1960) (current version at TEX. PROP. CODE ANN. §§ 115.001-.012 (Vernon Pam. 1983)) granted the district court original jurisdiction to construe the trust instrument and to determine the rights and liabilities of the trustee. Furthermore, the court held that the district court had jurisdiction under the Texas Declaratory Judgment Act. *Id.* art. 2524-1 (Vernon 1965). 651 S.W.2d at 816.

131. *Id.* at 817 (citing *Baker v. Goldsmith*, 582 S.W.2d 404, 406-07 (Tex. 1979); *Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240, 243 (Tex. 1974)).

132. 651 S.W.2d at 818.

133. *Id.*

134. *Id.* at 818 (quoting *Alexander v. Hagedorn*, 148 Tex. 565, 574, 226 S.W.2d 996, 1001 (1950)).

135. 651 S.W.2d at 818.

and therefore it denied Virginia's request for an equitable bill of review.¹³⁶ The court observed that Mrs. Wilkerson and Jack did nothing to prevent Virginia from presenting her claim against them.¹³⁷ In fact, Virginia consulted a geologist concerning the value of the mineral interests before she approved the settlement agreement.

In *Price v. Johnston*¹³⁸ Rose Morris's will provided for the creation of two testamentary trusts. The first trust, referred to as the Price trust, named the testator's daughter as beneficiary; the second trust, the Johnston trust, designated the testator's three grandchildren as beneficiaries. Each trust contained an undivided one-half interest in a particular house and the property on which the house was situated. The will named Robert M. Johnston, a beneficiary under the Johnston trust, as trustee for the Price trust. The Johnston trust was eventually terminated and Harold Johnston, Robert's brother, became full owner of the one-half interest in the house and land originally owned by the Johnston trust. Robert Johnston, acting as trustee over the Price trust, sold to Harold the remaining undivided one-half interest in the house and property held by the Price trust, thereby making Harold the owner of the entire fee simple interest in the house and property.

The testator's daughter, the beneficiary under the Price trust, sought to have the sale of the Price trust corpus rescinded. She contended that absent specific provisions in the will, the Texas Trust Act did not allow a trustee to sell trust assets to a relative.¹³⁹ Initially, the court noted that the Morris will did not contain provisions specifically authorizing the trustee to sell trust property to a relative.¹⁴⁰ The trustee argued, however, that the will contained several provisions that granted the trustee broad discretion in his management duties and that the restrictions of the Texas Trust Act did not apply.¹⁴¹ Weighing the broad trustee management powers against

136. *Id.*

137. *Id.*

138. 638 S.W.2d 1 (Tex. App.—Corpus Christi 1982, no writ).

139. The daughter relied on TEX. REV. CIV. STAT. ANN. art. 7425b—12 (1960) (current version at TEX. PROP. CODE ANN. § 113.053 (Vernon Pam. 1983)) (trustee buying from or selling to himself or related parties).

140. 638 S.W.2d at 3.

141. The court stated:

In his brief, defendant points to certain phrases contained in the will (trust) which he argues gives him the power to sell trust property to a relative. Those phrases are the one in paragraph III, Sec. 6, which reads: "... without the joinder or concurrence of any beneficiary or any other person . . ."; the one in paragraph III, Sec. 6(a), which reads, "... on such terms, time and condition, . . . as the trustee may see fit . . ."; the one in paragraph III, Sec. 6(i), which reads, "To enter into any agreement deemed advisable by the trustee . . ."; the one in paragraph III, Sec. 6(n), which reads, "... all as the trustee may deem fit"; the one in paragraph III, Sec. 7, which reads, "... such individual interest of the trustee shall in no way limit the powers herein given and granted . . ."; and the one in paragraph III, Sec. 7, which reads, "... but all acts of the trustee under the terms hereof shall be valid and binding upon the trust estates and the beneficiaries thereof, whether such acts prove of benefit of such trust estates or not." Defendant also points to the following sentence from paragraph IV: "I hereby authorize and empower my Executor to exer-

the fiduciary standards under the Texas Trust Act, the court found the trust act controlling. After stating that the statute should be strictly construed in favor of the beneficiaries, the court held that since the will did not specifically authorize a sale to a relative, the Texas Trust Act must apply, thus prohibiting the sale of property from the trustee to his brother.¹⁴²

Hostility Not a Ground for Removal of Trustee. In *Dahl v. Akin*¹⁴³ a dispute concerning Lille E. Dahl's will ultimately led to a suit between Gloria Akin, beneficiary and daughter of the deceased, and her father, George Dahl. Akin unsuccessfully attempted to persuade the court to appoint a permanent guardian over the personal estate of Dahl, contending that Dahl had become legally incompetent to attend to his personal and business affairs. In response to Akin's guardianship action, Dahl sued Akin for malicious prosecution and received a favorable monetary judgment for damages. Akin then brought the present suit seeking to remove Dahl as trustee. The trial court rendered judgment removing Dahl as trustee, reasoning that he had developed such hostility toward Akin that his decisions as trustee would probably adversely affect Akin's interests. In addition, the trial court relied on its finding that George Dahl had previously mismanaged the trust estate.

The Amarillo court of appeals disagreed with the trial court and ruled that the facts presented at trial did not support Dahl's removal as trustee.¹⁴⁴ The court stated that the existence of ill will between a trustee and a beneficiary does not justify removal of a trustee unless it affects the trustee's faithful performance of his duties or the special interests of the beneficiaries.¹⁴⁵ The court reasoned that the provision of the will exonerating the trustee from any act of misjudgment, together with the absence of any finding that Dahl's hostility toward the beneficiary had affected his integrity or discretion, proved sufficient to deny Dahl's removal.¹⁴⁶

Resulting Trusts. A resulting trust can arise in three cases: (1) Upon failure of a private express trust for want of a beneficiary; (2) When the property in a private express trust is excessive for the trust purpose; and

cise and perform all of the powers of sale, leasing and disposition of the properties of my Estate as I have conferred upon my Trustee in the preceding Paragraph II of this Will, all free from the control of the Probate Court and without the joinder or concurrence of any beneficiary, to be exercised by my Executor in his sole discretion as he may deem fit."

Id.

142. *Id.* at 4. The court also concluded that it was not necessary to consider the appellant's point of error regarding the inadequacy of consideration since the sale to the brother could not take place. *Id.*

143. 645 S.W.2d 506 (Tex. App.—Amarillo 1982), *aff'd*, 27 Tex. Sup. Ct. J. 23 (Oct. 8, 1983); see *supra* notes 123-26 and accompanying text (discussion of facts).

144. 645 S.W.2d at 533.

145. *Id.* at 532 (citing *White v. White*, 15 S.W.2d 1090, 1093 (Tex. Civ. App.—Texarkana 1929), *writ dismissed*, 25 S.W.2d 826 (Tex. Comm'n App.—1930, holding approved)).

146. 645 S.W.2d at 532.

(3) When one person provides the purchase money to acquire property that is conveyed to another person without any indication that the grantee holds the property as trustee for the person who provided the purchase money. Two recent Texas cases considered the circumstances under which a purchase money resulting trust will be recognized.

In *Bybee v. Bybee*¹⁴⁷ Michael Bybee purchased a one-half interest in twenty-five acres of land six months prior to his marriage to Rosalie Gilbert. Bybee's \$2000 down payment consisted of \$200 from his future wife, \$1000 from his grandfather, Leon L. Bybee, and his own \$800 contribution. After Bybee and Gilbert were married, payments on the note came from community property funds. Several years after her marriage to Bybee, Gilbert sued for divorce and property division. The trial court characterized Bybee and Gilbert as joint purchasers of the one-half interest in the twenty-five acre tract and divided the property equally between them. Bybee appealed the equal division ruling.

The appellate court initially characterized the subject property as the separate property of Bybee.¹⁴⁸ The appellate court then stated that the only theory that would reconcile the trial court's judgment with its finding that the property was properly classified as Bybee's separate property was the theory of a resulting trust in favor of Bybee's wife.¹⁴⁹ Relying on *Wright v. Wright*,¹⁵⁰ the court set out the elements of a resulting trust:

It is familiar law that a trust must result, if at all, at the very time a deed is taken and the legal title vested in the grantee. No oral agreement before or after the deed is taken, and no payments made after the title is vested, will create a resulting trust, unless the payments are made in pursuance of an enforceable agreement upon the part of the beneficiary existing at the time the deed is executed. The trust must arise out of the transaction itself.¹⁵¹

The court ultimately held that the facts in the present case were insufficient to establish a resulting trust, and it remanded the portion of the case pertaining to the property division to the trial court.¹⁵² The court also observed that the expenditure of community funds to discharge Bybee's separate obligation on the note secured by the property simply created a claim by the wife for reimbursement of funds used to enhance the value of Michael Bybee's separate property, less community funds expended to enhance the value of her separate property.¹⁵³

In 1975 Equitable Trust Company (ETC) obtained a \$70,000 judgment against Jon Roland. In satisfaction of this judgment ETC paid Roland's receiver \$5000 for property owned by Roland, referred to as Henze Farms.

147. 644 S.W.2d 218 (Tex. App.—Fort Worth 1982, no writ).

148. *Id.* at 219. The court reasoned that since Michael Bybee's name alone appeared on the promissory note and the deed, the subject property could only be separate property.

149. *Id.* at 220.

150. 134 Tex. 82, 132 S.W.2d 847 (1939).

151. 644 S.W.2d at 220-21 (quoting *Wright*, 134 Tex. at 86, 132 S.W.2d at 849).

152. 644 S.W.2d at 222.

153. *Id.* at 221.

After Roland had acquired Henze Farms, but before its conveyance to ETC, Roland had signed an instrument stipulating that he had purchased Henze Farms as an agent of Miladie Fraser, his mother and true owner of the property. In *Equitable Trust Co. v. Roland*¹⁵⁴ ETC sought to establish clear title to the property by having the transfer from Roland to his mother set aside. Roland argued that a resulting trust arose when he purchased Henze Farms and that he served as trustee for the benefit of his mother. The court held that the instrument produced by Roland was insufficient to establish a resulting trust in favor of Fraser because the agreement it purported to show was not entered into contemporaneously with Roland's purchase of Henze Farms.¹⁵⁵

Constructive Trusts. In the past, Texas courts have used the constructive trust as an equitable remedy to prevent unjust enrichment.¹⁵⁶ A constructive trust is distinguishable from a resulting trust in that the law imposes the trust to prevent the person holding the title to property from profiting by a wrong.¹⁵⁷ Crucial to the existence of a constructive trust is a finding that the alleged trustee procured the transfer of title to himself either by fraud, duress, or undue influence or through an abuse of a confidential relationship between the parties giving rise to a mutual fiduciary duty.¹⁵⁸ A purchase money resulting trust, by way of contract, must arise out of an express agreement entered into contemporaneously with the conveyance to the alleged trustee. Fraud, duress, undue influence, and confidential relationships are irrelevant to a finding of a purchase money resulting trust.

In the first case analyzed the court raised a constructive trust, but in the other three cases, the courts refused to impose a constructive trust, thereby denying relief to the respective petitioners. In the three cases denying relief, the petitioners had not come into equity with "clean hands,"¹⁵⁹ and, therefore, the court chose to leave the respective petitioners where it had found them. Finally, the Fifth Circuit applied Texas law in raising a constructive trust.

Constructive Trust Raised. In *Hudspeth v. Stoker*¹⁶⁰ the court imposed a constructive trust upon proceeds of a life insurance policy for the benefit of

154. 644 S.W.2d 46 (Tex. App.—San Antonio 1982, no writ).

155. *Id.* at 51. The court stated:

[B]ecause the document offered up by the appellees was executed many years after the purported trust would have had to have arisen, it cannot be considered as evidence to establish the existence of such resulting trust. Evidence contemporaneous with Roland's purchase in 1966 of the interest in the partnership, supposedly as his mother's agent, is required to prove such relationship.

Id.

156. *Omohundro v. Matthews*, 161 Tex. 367, 373, 341 S.W.2d 401, 405 (1960).

157. *Id.* at 373, 341 S.W.2d at 405.

158. *Harris v. Sentry Title Co.*, 715 F.2d 941, 946 (5th Cir. 1983).

159. *See id.* at 950 n.6.

160. 644 S.W.2d 92 (Tex. App.—San Antonio 1982, no writ).

the policyholder's children.¹⁶¹ During divorce proceedings between Edward Hudspeth and his first wife, Christine Stoker, Mr. Hudspeth entered into a property settlement agreement that designated Stoker, in her capacity as trustee for the benefit of their children, as beneficiary under his group life insurance policy. Hudspeth agreed to continue making premium payments on the policy. After the court entered the final divorce decree, which incorporated the property settlement, Hudspeth's employer changed insurance carriers and terminated the original life insurance policy. At the time of Hudspeth's death, his current life insurance policy designated his second wife as beneficiary. In an interpleader action by the insurance company, Stoker argued for the imposition of a constructive trust on the proceeds of the life insurance policy, for the benefit of Hudspeth's and Stoker's three children.

The court stated that the imposition of a constructive trust required a showing of either actual or constructive fraud.¹⁶² The law defines actual fraud as dishonesty of purpose or an intent to deceive, while constructive fraud entails "a breach of trust or confidential relationship which equity decrees worthy of protection."¹⁶³ The court, relying on *Fitz-Gerald v. Hull*,¹⁶⁴ noted that the acquisition or retention of property through an abuse of confidence represents unconscionable action and generally justifies declaration and enforcement of a constructive trust.¹⁶⁵ Furthermore, the court relied on the Florida appellate case of *Dixon v. Dixon*,¹⁶⁶ which held under a similar fact situation that the settlement agreement in the divorce decree essentially surrendered any ownership over the property. The owner of the policy therefore did not have the authority to change the beneficiary designation. In addition, the Florida court found no legal significance in the change of insurance carriers.¹⁶⁷ Relying on this authority, the court affirmed the imposition of a constructive trust on the life insurance proceeds.¹⁶⁸ The court reasoned that by designating a new beneficiary on his group life insurance, Hudspeth contravened the property settlement agreement incorporated in the divorce decree.¹⁶⁹

Constructive Trust Denied. Alviso Neely and his wife entered into a contract with Clyde Butler and his wife, wherein the Neelys agreed to make payments and repairs on the Butler homestead in consideration for the Butlers' designation of the Neelys as beneficiaries to the Butler homestead in their wills. The Butlers died without naming the Neelys in their wills, and the Butlers' executor subsequently deeded the property in controversy to a third party. The Neelys brought suit against the executor of the Butler

161. *Id.* at 96.

162. *Id.*

163. *Id.*

164. 150 Tex. 39, 237 S.W.2d 256 (1951).

165. 644 S.W.2d at 94.

166. 184 So. 2d 478 (Fla. Dist. Ct. App. 1966).

167. *Id.* at 481.

168. *Hudspeth*, 644 S.W.2d at 96.

169. *Id.*

estate, without joining the third party, seeking specific enforcement of the contract between the Butlers and themselves, and requesting that a constructive trust be placed upon the Butlers' homestead for the Neelys' benefit. At trial the Neelys produced the contract in question and evidence showing that the Neelys paid 144 of the 200 payments required under the contract. The Fort Worth court of appeals held, however, that the Neelys' failure to comply strictly with the requirements of the contract precluded them from receiving specific performance of the contract.¹⁷⁰ Furthermore, the court characterized the third party to whom the executor deeded the property as an indispensable party and held that the Neelys' failure to join the third-party purchaser prevented the imposition of a constructive trust on the property.¹⁷¹

In *Kennard v McCray*¹⁷² Thomas Kennard entered into a licensing contract with a manufacturing company that agreed to market his inventions and pay him one-half of the royalties. Kennard assigned his right to one-half of the royalties to his former wife, Lula McCray, in exchange for her agreement releasing him from his obligation under the divorce decree to pay child support. Kennard's will named Eula Pope Kennard, his wife at the time of his death, as independent executrix and sole beneficiary of his estate. Eula Kennard filed an action against the manufacturing company claiming it was in breach of its licensing agreement by failing to pay royalties to Kennard's estate from the date of the assignment.¹⁷³ Eula Kennard requested, in the alternative, that the court place a constructive trust for her benefit on the royalties previously paid to Lula McCray on the ground that the assignment of the royalty payments from Kennard to Lula McCray was void as a matter of law for lack of consideration. Specifically, Eula Kennard argued that the only consideration for the assignment of royalties to McCray was an agreement to release Kennard from child support obligations under the divorce decree and that Texas courts have consistently held that such attempts to modify a decree for child support are void and unenforceable. The court, however, held that those general principles did not apply to this case because such agreements are held void and unenforceable only in a suit by the wife against the former husband to compel payment under the terms of the divorce decree.¹⁷⁴ The court distinguished the current case, noting that here the custodial parent took no

170. *Neely v. Schooler*, 643 S.W.2d 229, 231 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.). The Neelys sought no other relief but specific performance. *Id.*

171. *Id.* Texas law requires that all parties to an action for specific performance who have an interest in the contract should be stated if known since they are indispensable parties. *Id.* (citing TEX. R. CIV. P. 39(c); 1 R. McDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 3.28.4 (F. Elliott rev. ed. 1981)).

172. 648 S.W.2d 743 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

173. In rejecting Eula Kennard's argument against the manufacturing company, the court stated that lack of consideration is purely a matter between the assignee and the assignor. It is immaterial so far as the duty of the manufacturing company is concerned, since payment to the assignee discharged its obligations under the contract. *Id.* at 745 (citing *St. Louis Sw. Ry. v. Jenkins*, 89 S.W. 1106, 1107 (Tex. Civ. App.—San Antonio 1905, writ ref'd)).

174. 648 S.W.2d at 745.

action to compel the father to make support payments after the execution of the assignment.¹⁷⁵ McCray made no attempt to enforce the divorce decree. Rather, it was the representative of the noncustodial parent's estate who sought to set aside the assignment of royalties. The court found sufficient consideration to support the assignment in Lula McCray's forbearance to insist upon payment of the child support arrearages, and the court therefore denied imposition of a constructive trust.¹⁷⁶ Finally, the court concluded that since Kennard had performed an illegal contract the court would leave the parties where it found them and not use its good offices to assist one of the parties to that agreement.¹⁷⁷

Constructive Trusts in the Fifth Circuit. Home Engineering, a company controlled by Alan Whatley, acquired certain real property in 1970 as part of a scheme with Travis Ward for the ultimate acquisition by Ward of a 490-acre tract in Henderson County. Ward furnished Whatley with \$5000 in cash and a \$25,000 promissory note to meet the sale price of the subject property, which was known as the Dyckman property, although various companies controlled by Whatley actually made the payments on the promissory note. Thereafter Whatley experienced financial difficulties causing the foreclosure sale of the Dyckman property to Ward for \$250,000. Ward initiated an interpleader action and asserted a claim to the proceeds from the foreclosure sale by arguing that Whatley had purchased the property as his agent, thus entitling him to the net proceeds from the sale.¹⁷⁸ A federal district court imposed a constructive trust in favor of Ward upon the net foreclosure sale proceeds, and Whatley appealed. The Fifth Circuit noted that Texas law imposes two general prerequisites to the imposition of a constructive trust: (1) a longstanding fiduciary or confidential relationship between the parties unrelated to the transaction in question,¹⁷⁹ and (2) a determination that unjust enrichment would result if the court did not impose the remedy of a constructive trust.¹⁸⁰

Initially, the court addressed the issue of whether a fiduciary or confidential relationship, unrelated to this particular transaction, existed between Ward and Whatley. In holding that a confidential relationship did not exist between Ward and Whatley, the court found significant the fact that their business dealings were not separate and distinct but rather "all part of a single master plan."¹⁸¹ The court next addressed the issue of unjust enrichment, noting that while the profit from the Dyckman property

175. *Id.*

176. *Id.* at 745-46.

177. *Id.*

178. *Harris v. Sentry Title Co.*, 715 F.2d 941, 943 (5th Cir. 1983).

179. *Id.* at 946 (citing *Rankin v. Naftalis*, 557 S.W.2d 940, 944-45 (Tex. 1977); *Gaines v. Hamman*, 163 Tex. 618, 624-25, 358 S.W.2d 557, 560-61 (1962)).

180. *Harris v. Sentry Title Co.*, 715 F.2d 941, 948 (5th Cir. 1983). The court, however, also stated that since the imposition of a constructive trust is an equitable remedy, there is no unyielding formula for determining whether a constructive trust exists on each particular set of facts. *Id.* at 946.

181. *Id.* at 948.

was certainly enrichment, it did not constitute unjust enrichment unless the profit equitably belonged to another person.¹⁸² Although Ward provided the down payment for the Dyckman tract, Whatley's companies made the mortgage payments and managed the property until they were struck by insolvency. Ward provided the down payment in the hope that it would aid in the purchase of the 490-acre tract. The court concluded that while enrichment or profit may have resulted, no unjust enrichment occurred in this case.¹⁸³ Thus, with both the fiduciary relationship and unjust enrichment tests unsatisfied, the court reversed the district court's order imposing a constructive trust on the proceeds from the sale of the Dyckman property.¹⁸⁴

III. ESTATE ADMINISTRATION

Probate Court Jurisdiction. In *Sobel v. Taylor*¹⁸⁵ Dr. Irving Taylor brought suit in the Harris County district court against his brother, Saul Taylor, and his sister, Lillian Taylor, individually and in their capacities as co-trustees and co-executors. The suit alleged that each defendant breached his or her fiduciary duty in the administration of a trust created by their mother, Eva Spero, for her own benefit during her lifetime. Dr. Taylor also alleged a breach of fiduciary duty by Saul and Lillian during the administration of their mother's estate.

The district court entered several interlocutory orders regulating the defendants' use of named documents and enjoining defendants from paying their attorney's fees from the assets of Mrs. Spero's estate until the conclusion of the trial. Saul and Lillian appealed the orders, arguing that under sections 5(c) and 5(d) of the Probate Code the district court lacked jurisdiction over the suit and the probate court in which the Taylor will was probated had jurisdiction. Sections 5(c) and (d) provide in part that all applications, petitions, and motions regarding probate or estate administration must be filed and heard in a statutory probate court, county court, or other statutory court exercising the jurisdiction of a probate court, rather than in a district court.¹⁸⁶ In addition, all courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate.¹⁸⁷

182. *Id.* at 950 (citing RESTATEMENT OF RESTITUTION § 1 (1937); 66 AM. JUR. 2d, *Restitution and Implied Contracts* § 3 (1931)).

183. *Harris v. Sentry Title Co.*, 715 F.2d 941, 950 (5th Cir. 1983).

184. *Id.* at 951. In a lengthy dissent Justice Will found the majority opinion inconsistent with Texas law. Initially, Justice Will stated that Texas case law supports the proposition that no formula exists with respect to the imposition of a constructive trust and that, therefore, the two-prong test proffered by the majority is not to be considered absolute. Rather, a case-by-case determination is to be made in determining whether a constructive trust is warranted. *Id.* at 955. Secondly, the dissent agreed with the district court finding that a confidential relationship existed between Ward and Whatley and that Whatley was unjustly enriched. *Id.* at 959. Therefore, the dissent argued for upholding the district court judgment imposing a constructive trust for the benefit of Ward. *Id.* at 961.

185. 640 S.W.2d 704 (Tex. App.—Houston [14th Dist.] 1982, no writ).

186. TEX. PROB. CODE ANN. § 5(c)-(d) (Vernon 1980).

187. *Id.* § 5(d).

The court of appeals held that the district court had original jurisdiction of this case because the action was not primarily a suit concerning or incident to an estate under section 5 of the Probate Code.¹⁸⁸ The court explained that the allegations chiefly involved acts and misrepresentations that predated the death of Eva Spero and allegedly occurred while the appellants were acting as trustees and not as executors for Eva Spero.¹⁸⁹

The court in *Cunningham v. Parkdale Bank*¹⁹⁰ held that the probate court had personal jurisdiction to render judgment over the executor of the Cunningham estate in his individual capacity.¹⁹¹ In the probate proceedings Maston Cunningham, executor of his mother's estate, filed an application to resign as acting executor, stating that he would promptly file a complete accounting showing the condition of the assets of the Cunningham estate. The probate court granted Maston's motion to resign and ordered him to file a complete accounting of his mother's estate. Maston's "exhibit in final accounting," covering the period in which he administered the Cunningham estate, stated that the Cunningham estate was insolvent, but that Maston had advanced to himself and his sister the sum of \$37,607.57. In addition, Maston characterized the advances as claims held by the estate, enforceable against him and his sister.

The probate court disapproved the exhibit in final account and rendered judgment in the amount of \$37,607.57 against Maston for improper disbursements from the Cunningham estate. In holding that the probate court had the requisite jurisdiction to enter a personal judgment against Maston, the court of appeals stated that as long as the parties were properly before the probate court it had jurisdiction to correct any wrongdoing.¹⁹² The court relied on *Currie v. Drake*,¹⁹³ which upheld a probate court order requiring the guardian of an estate pending in that court to restore to the estate money he had improperly diverted from the estate.¹⁹⁴

Venue. In 1981 the county court at law of Fort Bend County appointed Maria Radford as administratrix of the estate of her deceased sister, Emma Duren. In 1982, however, Edward Carter filed an application in the Harris County probate court for the probate of Emma Duren's alleged will. The Harris County court admitted the will to probate, naming Carter as executor of the Duren estate, but then transferred the proceedings to the Fort Bend county court, wherein Carter sought to have Radford's administration terminated. The Fort Bend county court, however, denied Carter's request, pending the probate of the Duren will in that court. In response

188. 640 S.W.2d at 707. The court also stated that the main "thrust" of Dr. Taylor's suit was not of such nature and magnitude as to vest exclusive jurisdiction with the probate court. *Id.*

189. *Id.*

190. 650 S.W.2d 484 (Tex. App.—Houston [14th Dist.]), *rev'd*, 27 Tex. Sup. Ct. J. 109 (Dec. 3, 1983).

191. *Id.* at 485.

192. *Id.* at 488 (citing *Northwest Fuel v. Brock*, 139 U.S. 216 (1891)).

193. 550 S.W.2d 736 (Tex. Civ. App.—Dallas 1977, writ *ref'd n.r.e.*).

194. *Cunningham*, 650 S.W.2d at 488.

to Carter's appeal of the Fort Bend county court order, Radford filed a motion to dismiss the appeal for want of jurisdiction, arguing that the order did not represent a final appealable order. In *Carter v. Radford*¹⁹⁵ the court held the Fort Bend county court order to be interlocutory and therefore nonappealable.¹⁹⁶ The court stated that section 5(e) of the Texas Probate Code only allows appeals of final, and not interlocutory, orders from probate courts.¹⁹⁷ Final or appealable orders, as opposed to interlocutory orders, conclusively dispose of the issues.¹⁹⁸

In applying this definition to the *Carter* case, the court concluded that the order denying termination of Radford's administration was interlocutory.¹⁹⁹ The court characterized Carter's effort to act under the proffered will as premature and instructed Carter to delay his challenge until the Fort Bend court had probated the will and Carter had been appointed executor.²⁰⁰ Furthermore, notwithstanding the court's lack of jurisdiction in addressing Carter's appeal, the court found that Carter's argument that section 8(d) of the Texas Probate Code required the Fort Bend court to recognize and enforce the Harris County district court's decree was untenable. The court stated that section 8 only applies when the transferor court has original jurisdiction over the estate and proper venue.²⁰¹

Standing to Seek Attorney's Fees. The cases continue to reinforce the notion that an attorney hired by a fiduciary is the personal attorney of the fiduciary. In no sense is the attorney the estate's attorney. Accordingly, the attorney must look to those who employed him for his compensation. Whether the fiduciary can then charge his attorney's fees against the property included in the estate is a separate question, the resolution of which depends, in many cases, upon statutory authorization. Usually the standard applied depends on whether the fees benefited the estate, or whether the fees incurred resulted from a good faith effort to accomplish probate, defend a will contest, or resist removal of the fiduciary.

In 1975 Wesley Anderson executed a will that provided for a testamentary trust for the benefit of his two children. Wesley named his brother, J.C. Anderson, as executor of the estate and as trustee. The trust was to be funded with the proceeds of a life insurance policy on the testator's life and the testator's stockholdings at the time of his death. Shortly after the execution of the will, J.C. Anderson fraudulently procured a change in the designation of beneficiaries on the testator's life insurance policy and stock certificates, naming himself as sole beneficiary. The testator, Wesley Anderson, died in 1976. Shortly thereafter, J.C. Anderson filed an applica-

195. 652 S.W.2d 469 (Tex. App.—Houston [1st Dist.] 1983, no writ).

196. *Id.* at 471.

197. *Id.* at 470 (citing TEX. PROB. CODE ANN. § 5(e) (Vernon 1980)).

198. 652 S.W.2d at 471 (citing *Cherry v. Reed*, 512 S.W.2d 705 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.)).

199. 652 S.W.2d at 469-70.

200. *Id.* at 471.

201. *Id.* (citing TEX. PROB. CODE ANN. § 8(d) (Vernon 1980)).

tion for probate of his brother's will. Wesley's children contested the will and sought to prevent the appointment of J.C. Anderson as independent executor. Furthermore, the testator's children obtained a court order requiring Anderson to retain separate counsel for himself, individually and as independent executor, in defending the will contest suit. Pursuant to that order, John Miller represented J.C. Anderson in the probate proceedings. At trial the children withdrew their contest to the admission of the will to probate but proceeded with their suit to prevent J.C. Anderson from being named independent executor. Upon the withdrawal of the contest suit, Miller discontinued his representation of Anderson. The court dismissed Anderson as executor and named the Corpus Christi National Bank as the substitute independent executor. Four months after the entry of the judgment, Corpus Christi National Bank, as trustee, paid Miller his attorney's fees for the representation of J.C. Anderson with funds from the Wesley Anderson estate. Wesley Anderson's children argued, however, that Miller was not entitled to payment from the assets of their father's estate.

The court of appeals in *Anderson v. Anderson*²⁰² held that Miller did not have standing to bring suit for payment of his fees out of the Wesley estate.²⁰³ The court stated that section 243 of the Texas Probate Code permits the executor, not the executor's attorney, to make a claim against the estates for attorney's fees incurred in admitting a will to probate.²⁰⁴ Notwithstanding Miller's lack of standing, the court added that section 243 requires that the issues of good faith and probable cause in defending the provisions of a will be raised in the original probate proceeding. The court concluded, therefore, that section 243 required that the claim be made during the original probate proceeding.²⁰⁵

The Texas Supreme Court, however, in *Miller v. Anderson*²⁰⁶ reversed the appellate court decision and held that Miller was entitled to collect the fee from the testator's estate.²⁰⁷ The court stated that the executor retained Miller pursuant to the court's order to perform services necessary to probate the will and that Miller performed those services.²⁰⁸ Miller presented his claim for these services and received the approval of the Corpus Christi National Bank. He then filed the claim with the court. In this situation, Miller's actions were tantamount to presentment of the claim to the court

202. 638 S.W.2d 55 (Tex. App.—Corpus Christi), *rev'd sub nom.* Miller v. Anderson, 651 S.W.2d 726 (Tex. 1983).

203. 638 S.W.2d at 58.

204. *Id.* at 58. TEX. PROB. CODE ANN. § 243 (Vernon 1980) provides:

When any person designated as executor in a will or as administrator with the will annexed, defends it or prosecutes any proceeding in good faith, and with just cause, for the purpose of having the will admitted to probate, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney's fees, in such proceedings.

205. 638 S.W.2d at 58.

206. 651 S.W.2d 726 (Tex. 1983).

207. *Id.* at 728.

208. *Id.*

by the executor, and the court held that Miller had complied with section 243 of the Texas Probate Code.²⁰⁹

Furthermore, the supreme court held that Miller did not err in failing to secure a finding in the trial court on the issues of good faith and probable cause.²¹⁰ In response to cited cases that require a trial court finding on the issues of good faith and probable cause, the court noted that in both the cited cases the courts denied probate to the proffered wills, necessitating a showing of good faith and just cause to demonstrate a compensable benefit to the estate as required by section 243.²¹¹ In this case, however, admitting the will to probate established a benefit to the estate and made the good faith and just cause tests inapplicable.²¹²

Premature Claim for Attorney's Fees. In *Klein v. Klein*²¹³ the court denied an independent executor's request for attorney's fees under section 149C of the Probate Code, characterizing the request as premature.²¹⁴ Donald Klein was the acting independent executor of the estate of Joseph Klein when Annabelle Klein, beneficiary under Joseph Klein's will, brought suit to have Donald Klein removed as executor. In her suit Annabelle accused Donald of misappropriating funds from the estate for his own use and of gross mismanagement in administering the estate. Donald answered Annabelle's petition by filing a general denial and requesting reasonable attorney's fees under Probate Code section 149C, which provides that an independent executor may seek reimbursement for expenses incurred in a good faith defense against a suit that seeks his removal.²¹⁵ Annabelle then filed her first amended pleading in which she carried forth her prior allegations against Donald and stated additional grounds for his removal. For reasons unknown to the appellate court the probate court treated the amended pleading as a separate and distinct proceeding. Furthermore, the court treated the original petition as still pending and set that cause for trial. Annabelle's attorneys refused to try the matters in the original petition without also litigating the additional points raised in Annabelle's amended pleadings. Her counsel nonsuited the original petition, resulting in a dismissal without prejudice. The court, however, rendered judgment in favor of Donald and awarded him reasonable attorney's fees for his defense in the original proceeding.

On appeal, Annabelle argued that the executor's claim for attorney's fees was premature as the action to remove the executor was still pending

209. *Id.*

210. *Id.*

211. *Id.* (citing *Russell v. Moeling*, 526 S.W.2d 533, 535-36 (Tex. 1975); *Huff v. Huff*, 132 Tex. 540, 543-44, 124 S.W.2d 327, 330 (1939)).

212. 651 S.W.2d at 728.

213. 641 S.W.2d 387 (Tex. App.—Dallas 1982, no writ).

214. *Id.* at 389.

215. TEX. PROB. CODE ANN. § 149C(c) (Vernon 1980) provides: "An independent executor who defends an action for his removal in good faith, whether successful or not, shall be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings."

in the probate court. Donald argued that denial of his claim for expenses incurred in defense of the original motion to remove until final disposition of the parallel proceeding would invite his adversary to file repeated similar motions, dismissing each in turn. This would defeat or delay his right to reimbursement for expenses incurred in good faith in defense of an action for his removal as allowed by section 149C of the Probate Code. In response to this argument the court of appeals acknowledged that Donald's contention might have merit if the other pending action involved a separate parallel proceeding; however, it did not involve such a proceeding. Annabelle's first amended pleading expressly stated that it was an amendment of the previous motion to remove, as well as of other motions pending. The amended motion superseded the original motion, leaving nothing that concerned the removal of Donald pending in the original probate action that could be construed as a separate proceeding.²¹⁶ The court concluded that the plaintiff's nonsuit could not be considered the termination of a removal action and that therefore any claim for attorney's fees by Donald would be premature until final disposition of the suit.²¹⁷

216. 641 S.W.2d at 388.

217. *Id.* at 388-89.

